



October 11, 2012

E-filed

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

**Re: Entertainment Software Association
Written Ex Parte Submission, Petition for Waiver of ACS Rules
CG Docket No. 10-213**

Dear Ms. Dortch:

We appreciate the Commission's efforts to timely address our pending waiver petition in the above-referenced docket. ESA would like to highlight some of the fundamental aspects of our above-referenced petition and the *Order*¹ in light of points raised by other stakeholders in several "ex parte" filings submitted over recent weeks.²

In-game chat is not a "co-primary" purpose but merely supplements game play.

- The factual record demonstrates that the primary purpose of each of the three classes, as designed and marketed, is game play. Contrary to the assertions by groups opposing the waiver, ESA proffered substantial evidence on the two relevant *Order* factors – design and marketing – that leaves no doubt as to the primary purpose of each class, including:
 - the design of controllers (multiple buttons and triggers solely designed to enhance game play);
 - the marketing of game consoles and software in dedicated "video game" sections in physical and online retail stores;

¹ *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 14557 (2011) ("*Order*").

² See, e.g., *Ex Parte* Communication, National Association of the Deaf, CG Docket No. 10-213 (submitted October 9, 2012) ("*NAD Ex Parte*") (citing other *ex parte* filings).

- the game development process (focusing on advanced graphics, artwork, music and other critical game elements);
- video game advertisements that emphasize game play (as shown in ESA's extensive exhibits filed alongside our Waiver Petition);
- voluntary game-rating systems (the Entertainment Software Ratings Board in the U.S.); and
- government findings (findings by the FCC, Federal Trade Commission, Environmental Protection Agency and the Department of Energy have all recognized game industry products as belonging to their own distinct category).

Additionally, anecdotal claims that consumer usage highlights the significance of ACS do not square with the evidence of record. On the contrary, recent Nielsen usage data demonstrates that offline gaming remains the predominant console activity on all three major game consoles. Indeed, nearly all games "can be played without invoking chat at all," ESA Reply at 5 (submitted June 25, 2012), which underscores that the primary purpose of all three classes is games, not ACS. *Cf. Order*, ¶ 186 (hypothetical removal of ACS may highlight primary purpose). The appendices to the ESA Petition for Waiver alone offer dozens of specific examples that demonstrate that these types of products or services qualify for the requested multi-purpose waiver.

- Co-primary status requires the class to be "*equally* designed for multiple purposes, none of which are the exclusive primary use or design purpose" (emphasis added). *Order*, ¶ 184; *see* June 2012 Reply at 4 & n.11. This status is plainly intended for a general-purpose computer or smartphone with a wide variety of stand-alone applications, and in which ACS functionality is on equal footing in the design and marketing of these devices. Co-primary status does not extend to ACS features that are subordinate or supportive to another function. Per the *Order*, a capability largely designed to support another function cannot qualify as co-primary but may be evidence of the actual primary purpose. *See Order*, ¶¶ 185-86; June 2012 Reply at 5-6.
- As ESA's submitted exhibits show, advertisements for game products may mention ACS-type features, among many other features that augment game play, in a sensible effort to maximize appeal. But merely noting chat as one of several complementary features that support game play does not mean that chat is marketed as an independent reason to purchase the product. *See* June 2012 Reply at 3-4. And, of course, mere mention of an ACS feature in an ad does not make it a primary or co-primary purpose of the game product. In fact, a product must have ACS functionality in order to be eligible for a waiver under the CVAA. *See Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751, 2757 (2010) (as codified in various sections of 47 U.S.C.) (the "Act").
- To the extent social features are mentioned in ads submitted to the record, many of the mentioned features do not constitute ACS because they involve human-to-machine, and not human-to-human, communications. Examples include game tournament

announcements, online marketplaces for virtual items, posting achievements to Facebook, and matching players for specific games.

- References to the presence of social features on the Xbox 360 menu system must be viewed in context. First, the example of the Xbox 360 “Social” hub is but one instance amidst a large number of other exhibits that unequivocally show game play as the primary purpose of the Xbox 360 and other games and game consoles. Second, most of the Xbox “Social” hub features are not ACS-related – i.e., creating/editing an avatar, writing a blog post, or learning about upcoming events. Third, as the 2012 Nielsen study indicates, the predominant use of game consoles is gameplay without ACS. *See, e.g.*, Petition at 14-15, 29.

The three classes are closely related and intertwined. The scope of the classes is appropriately limited to a clearly established video game market, and the classes should be subject to a common duration.

- Each of the classes meets the standard for a defined class set forth in the *Order*. The equipment or services in each class fall within clearly understood product categories, share similar ACS features, and are unified by a common primary purpose, as evidenced by their marketing and design. Further narrowing the definitions of any of these classes, or subjecting the interrelated products and services to different waiver durations, will confuse and frustrate consumers. For example, if a console received a waiver with one duration but its online network or third-party console games received a shorter duration, then a consumer seeking to use the accessibility features of the game or network when the first waiver expires might not be able to use those features where they are dependent upon the console to fully implement. For these and other reasons, it makes sense to subject all three classes to a common duration that is of sufficient length to allow for meaningful innovation without regulatory uncertainty.
- The *Order* focuses on the lifecycle of equipment, service or class. Lifecycle, as defined, includes a design phase as well as useful life. *Cf. Order*, ¶ 191 (contrasting the “design phase of the product lifecycle” with the lifecycle phase after the product is introduced). Game consoles define the critical technologies for most games, and offer a common benchmark for consumers, so providing these inter-related classes the same waiver period is consistent with the Commission’s goal of limiting confusion. *Id.* at 4-5. An eight year waiver is therefore appropriate for these offerings given the lifecycles of video game products. *Id.* Significantly, concerns about an evolution in the predominant use of these offerings over time are misplaced. If an offering changes so much that ACS becomes its primary purpose, as designed and marketed, that offering will fall outside the relevant class definition and longer receive the benefit of a waiver.
- In addition, the opportunity to ask the Commission to renew each of the proposed waivers prior to their expiration is reasonable and consistent with the *Order*. Opposition to the requested waivers often relies on speculative concerns that ACS may become a primary purpose of one or more of the three classes during the next several

years. *See, e.g., NAD Ex Parte* at 3-4. Even to the extent such concerns are not addressed by the careful definitions of each class, they are wholly speculative and may not prove accurate. Accordingly, they are not grounds to prohibit *now* any opportunity to seek to renew a waiver, following appropriate Commission procedures, several years into the future.

Game play itself is not at issue under the Act or this Order.

- Neither the Act nor the *Order* applies accessibility mandates to game play or other non-ACS functions. However, game companies have taken many voluntary steps, even prior to and independent of the Act, to improve game accessibility. *See, e.g.,* Petition at 36.
- As the Consumer Electronics Association has noted, requiring accessibility in a multi-purpose offering may reduce innovation or limit ACS functionality. *See* CEA Reply, CG Docket No. 10-213, at 3-4, 7 (submitted June 25, 2012). There is no ready-made solution to enable a game console, never mind every individual game, to translate fluently a live conversation across different communication inputs and outputs while preserving a seamless user experience across a network and within a game, which itself may depend on time-sensitive reactions and full-screen or fast-moving visual imagery.

These waivers serve the public interest. Among other public benefits, the proposed waivers will promote “greater predictability and certainty for all stakeholders,” *Order*, ¶ 193, allow the Commission to focus initial implementation and enforcement efforts on offerings squarely within the ambit of the Act, and encourage continued innovation without new regulatory burdens, including new and extensive recordkeeping requirements that otherwise apply to offerings subject to Section 716 of the Communications Act. A waiver also provides critical regulatory certainty to innovators. *Id.*, ¶ 190. For example, “[a] waiver relieves an entity of the obligations under Section 716, including the obligation to conduct an achievability analysis” and, “products and services already under development at the time when a class waiver expires, the achievability analysis conducted . . . may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point.” *Order*, ¶¶ 189, 194. As the *Order* notes, a waiver thus allows an innovator to “efficiently allocate resources to other uses,” *id.*, ¶ 190, which may in turn foster additional public benefits. In addition, “[s]ection 716 does not require manufacturers of equipment to recall or retrofit equipment already in their inventories or in the field.” *Id.*, ¶ 126. Accordingly, all products and services covered by a class waiver “that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the duration of the life of those particular products and services,” absent substantial upgrades to those offerings. *Id.*, ¶ 194.

Because the record in this proceeding establishes that the proposed waivers are consistent with the Act, the *Order*, and the public interest, the ESA urges the Commission to grant the proposed waivers within the 180-day timeframe established by the *Order*.

Respectfully submitted,

/s/ Christian Genetski

Sr. Vice President & General Counsel
Entertainment Software Association

575 7th Street NW, #300
Washington, DC 20004